

Supreme Court, U. S.

F I L E D

NOV 19 1976

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

— o — 76 — 705

No.

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THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,

Respondents.

— o —

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

— o —

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**PETITION FOR A WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT**

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The Petitioners, the School District of Omaha, Owen A. Knutzen, Superintendent of Schools, and the members of the Board of Education of the School District of Omaha, respectfully pray that a writ of certiorari issue to review the judgments and the opinions of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 12, 1975, and August 24, 1976.

—o—

OPINIONS BELOW

The August 24, 1976, opinion of the Court of Appeals is reported at 541 F. 2d 708 (8th Cir. 1976) and appears in the separate Appendix hereto at pages 172 to 175. The District Court opinion on the motion for new trial on the plan, not yet reported, appears in the separate Appendix at pages 165 to 169. The District Court opinion approving the plan for desegregation is reported at 418 F. Supp. 22 (D. Neb. 1976) and appears in the separate Appendix at pages 139 to 145. The opinion of the Court of Appeals on the issue of liability is reported at 521 F. 2d 530 (8th Cir. 1975) and appears in the separate Appendix at pages 100 to 133. The opinion on liability issued by the District Court is reported at 389 F. Supp. 293 (D. Neb. 1974) and appears in the separate Appendix at pages 41 to 98. The opinion on the motion to intervene issued by the District Court is reported at 367 F. Supp. 198 (D. Neb. 1973) and appears in the separate Appendix at pages 34 to 40. The District Court's opinion on the motion for a preliminary injunction is reported at 367 F. Supp. 179 (D. Neb. 1973) and appears in the separate Appendix at pages 1 to 33.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered on August 24, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1). Review of the interlocutory judgment of June 12, 1975, is sought under the authority of *Mercer v. Theriot*, 377 U. S. 152, 153-54 (1964), and *Falk v. Brennan*, 414 U. S. 190, 194, n. 7 (1973).

QUESTIONS PRESENTED

1. Do school districts with racially imbalanced neighborhoods violate the Fourteenth Amendment merely by adopting or maintaining policies which in fact have as one of their effects some racial separation or imbalance in the schools?
2. Does mere proof that school district actions had a foreseeably segregative effect compel a finding of segregative intent?
3. Does a federal court have the remedial authority to fully integrate racially imbalanced schools without finding the extent of the racial imbalance in fact caused by purposefully discriminatory school district policies and without finding the extent to which the effects of such purposeful discrimination would be eliminated by prohibiting the policies?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved in the resolution of this matter are set forth in the Appendix attached to this Petition: (1) The Fourteenth Amendment to the United States Constitution, Section 1; (2) 42 U. S. C. Section 2000c-6; (3) 42 U. S. C. Section 1983.

STATEMENT OF THE CASE

I. The Background.

This suit was instituted on August 10, 1973, in the District Court for the District of Nebraska by the United States of America under 42 U. S. C. Section 2000e-6 (a). The United States contended that the School District of Omaha, its superintendent, and the members of its Board of Education (hereinafter collectively referred to as the "School District") engaged in racial discrimination in the operation of the Omaha Public School System in violation of Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. Several black students and their parents were allowed to intervene pursuant to Rule 24 (b) (2) of the Federal Rules of Civil Procedure. They asserted a similar claim for deprivation of their right to equal protection of the laws under 42 U. S. C. Section 1983 and the Fourteenth Amendment to the United States Constitution. (The United States and intervenors are hereinafter collectively referred to as the "Plaintiffs".)

For the 1973-74 school year the School District of Omaha had a total enrollment of 60,502 students. The boundaries of the School District are not coterminous with those of the City of Omaha. Substantial portions of the city are within School District No. 66 and the Millard School District, both of whose enrollments are almost totally white. Segregation of the races within the boundaries of the School District of Omaha or the City of Omaha has never been mandated by any statute or by any local regulation, policy or ordinance. The basic method of student

assignment is, and always has been, the neighborhood school policy.

There has been a rapid expansion of the black population of Omaha. In 1950 the black population was 16,311 (6.5% of the total population) and in 1970 it was 34,431 (9.9% of the total population). During each of the years from 1950 to 1970 the black birth rate substantially exceeded the white birth rate. From 1950 to 1973 the total black enrollment in the School District of Omaha grew from 2,862 to 11,962, an increase of 318% and the black percentage of the total enrollment increased from 10% to 20%.

The black population is concentrated primarily in one geographic area of the city, and this concentration is reflected in the racial enrollments of the neighborhood schools serving that area. Despite this concentration, for the 1973-74 school year, 40.6% of the black students attended majority white schools and 85.9% of all schools had some black enrollment.

II. The History of the Case.

This case is before this Court for a second time. A writ of certiorari was sought following the interlocutory reversal by the Eighth Circuit Court of Appeals of the District Court on the question of liability. No. 75-270. The Court of Appeals has now entered a final order on liability and remedy. This Petition seeks review of the Court of Appeals' judgment on both phases of this case.

The liability phase of this litigation focused on certain aspects of the School District's neighborhood school policy and on whether the racial imbalance present in the school system was intentionally caused or maintained by the

School District. Following the pattern of other school desegregation cases, the Plaintiffs alleged intentional racial discrimination in: (1) the hiring of faculty; (2) the placement of portable classrooms within the District; (3) the alteration of school attendance boundaries; (4) the assignment of black faculty; (5) the adoption of an open transfer policy for students; (6) the adoption of certain feeder patterns for junior high schools; (7) the construction of schools; and (8) the condition of one particular school, Technical High School.

After a two-and-one-half week trial, the District Court issued an opinion dismissing the action and holding, based on all of the evidence before it from the trial and from the hearing on the United States' motion for a preliminary injunction, that:

“. . . this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority students by practicing a deliberate policy of racial segregation.” (App. p. 97).

The District Court arrived at its conclusion by applying the standard which this Court enunciated in *Keyes v. School District No. 1*, 413 U. S. 189 (1973), and subsequently reaffirmed in *Washington v. Davis*, 96 S. Ct. 2040 (1976). First, the District Court held that the burden of proof was on the Plaintiffs to show that an intentionally segregative policy was practiced in a meaningful or significant portion of the school system. Second, it recognized that once the Plaintiffs had borne their burden of proof on purpose to segregate with respect to a meaningful portion of the school system, the burden of proof shifted to the School

District to show that its actions as to any other segregated schools within the school system were not motivated by purpose or intent to segregate. Third, it recognized that intent or purpose to segregate must in most cases be inferred from the objective actions of the school authorities. Fourth, it held that the natural and foreseeable consequences of the School District's actions were neither determinative nor immaterial, but rather constituted an additional factor to be weighed in evaluating its overall intent (App. pp. 43-44).

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court. While ostensibly agreeing with this Court in *Keyes* and with the District Court that school desegregation may not be ordered by a federal court unless there is a finding that segregation was brought about or maintained by intentional state action, the Court of Appeals held that the District Court erred as a matter of law in its placement of the burden of proof on this issue. The Court of Appeals held that the plaintiff in a school desegregation case need only prove that racial imbalance exists in the schools and was the natural, probable, and foreseeable consequence of school district action or inaction. The plaintiff need not prove purpose or intent to segregate by the defendant in a meaningful portion of the school district. Mere proof of racial separation effects creates a presumption of purpose to segregate and shifts the burden of proof to the school authorities to establish that segregative intent was not among the factors that motivated their actions regarding any of the racial imbalance in the schools (App. pp. 107-108).

The Court of Appeals held that, as to five of the policy areas challenged at trial, the foreseeable conse-

quence of School District actions and inactions was to create or maintain racially imbalanced schools and therefore the School District was presumed to have taken those actions and inactions with a racially discriminatory purpose. The Court of Appeals concluded that the School District had failed to rebut the presumption by carrying its burden of establishing that segregative intent was not among the factors motivating its actions.

The five areas where the Court of Appeals found racial separation attributable to actions of the School District were: (1) the assignment of black faculty to already black schools; (2) the open transfer policy initiated upon the recommendation of the Mayor's bi-racial committee; (3) feeder patterns for Horace Mann Junior High School and for Technical Junior High School, which had closed a year before this litigation commenced; (4) neighborhood school construction; and (5) the condition of Technical High School.

The Court of Appeals applied its standard to School District policies in each of these areas and based upon that standard, and that standard alone, found a violation of the Fourteenth Amendment. The Court of Appeals did not review the District Court's findings under Rule 52 (a) of the Federal Rules of Civil Procedure. Thus, it did not hold that the District Court's findings were "clearly erroneous" under the legal standard employed by the District Court.

The propriety of the Court of Appeals' reversal of the District Court must be determined by the propriety of its legal standard. And that legal standard is clearly

improper. The significance of the Court of Appeals' presumption, and the feature which distinguishes it from the law of *Keyes* is that it removes proof of discriminatory purpose from the plaintiff's *prima facie* case with respect to a meaningful portion of the school district and instead places the burden of proving that there was not intent to segregate as to any school on the defendant school district.

In addition to reversing the District Court on liability, the Court of Appeals also ordered full integration of the entire School District of Omaha no later than the beginning of the 1976-77 school year according to certain racial balance remedy guidelines which the Court of Appeals developed *sua sponte* and which it thereafter modified *sua sponte*. As modified, these racial balance guidelines required that no school have a black enrollment exceeding 50% of the total enrollment, that no school with a black enrollment lower than 25% of the total enrollment be permitted to have a black enrollment exceeding 25%, and that the burdens of achieving this integration be borne equally by blacks and whites in all areas of the School District of Omaha. Such guidelines in fact called for a system-wide alteration of assignment policies and required the bussing of substantial numbers of students. Only the mechanical details of the plan were left to the School District and the District Court to work out.

The major contours and scope of the remedy were thus determined by the Court of Appeals even though the remedy was not in issue in the trial court, had not been raised as an issue on appeal, and was not addressed by any of the parties either by brief or oral argument before the Court of Appeals. Moreover, these remedial deter-

minations were made without any inquiry into the precise extent of the racial separation caused by the policies the Court of Appeals found violative of the Fourteenth Amendment and without any inquiry into the extent to which the effects of these policies would continue after the policies were eliminated.

Following the Court of Appeals' decision, the School District filed a petition for rehearing en banc with that court both on the liability question and on the propriety of issuing remedy guidelines at that stage of the litigation. The School District's petition for rehearing was denied and no hearing was held.

Thereafter, the School District filed a petition for a writ of certiorari with this Court, No. 75-270, seeking a reversal of the Court of Appeals' decision. That petition presented two questions to this Court. First, whether the Court of Appeals had utilized an improper standard for determining purpose or intent to segregate. Second, whether the guidelines of the Court of Appeals were improperly issued at that stage of the litigation without any opportunity for the parties to submit evidence or argument on the appropriate remedy. The propriety of the guidelines themselves was not raised since such remedial questions before this Court were premature. This Court denied the School District's petition. 423 U. S. 946 (1975).

Following the denial of its petition for a writ of certiorari, the School District prepared a plan for desegregating its schools according to the dictates of the racial percentage guidelines established by the Court of Appeals. That plan, with certain modifications suggested by the

Plaintiff United States of America, was adopted by the District Court (App. pp. 139-65). In submitting this plan the School District reserved its objections to the racial percentage guidelines imposed by the Court of Appeals. Those objections were formally presented to the District Court by a motion for a new trial filed after the District Court's memorandum opinion of April 27, 1976. The District Court denied the School District's motion for a new trial in this respect, taking the position that the propriety of the Court of Appeals' guidelines was beyond the scope of the District Court's review (App. p. 169).

The Plaintiff-Intervenors and the School District both appealed the District Court's order approving the plan. The School District raised before the Court of Appeals the issue of the propriety of the remedy guidelines. The Court of Appeals, en banc, heard argument on both appeals on August 17, 1976. One week later, on August 24, 1976, the Court of Appeals entered a *per curiam* opinion affirming the District Court's plan (App. pp. 172-75). The plan (App. pp. 147-65) requiring the reassignment of over 10,000 students went into effect on September 7, 1976.

REASONS FOR GRANTING THE WRIT

The issues raised herein are basic to restoring fairness and reason to the methods by which federal courts evaluate evidence on claimed discriminatory purpose and on appropriate remedies in school desegregation cases. The unique rules applied by most lower federal courts to school desegregation cases, which lead inevitably to system-wide racial balance decrees, are particularly damaging to the public's confidence in the judicial process. Such cases directly affect the lives of large numbers of citizens who bear the burdens of remedies for claimed wrongs for which they are not personally responsible and often arise only from presumed violations by elected officials.

The trial of a school desegregation case is usually focused upon the issue of whether the school authorities have acted with a discriminatory design. These cases usually take weeks or even months for the presentation of evidence. Because findings of liability are indirectly mandated by legal standards which conceal the true reason for decision and which would never be applied in other contexts, the public, and a growing number of legal scholars,¹ perceive such trials as only a necessary formality with a predetermined result. In this area, the federal courts are seen as engaging in social legislation, without the sanction of popular election, and as using methods unprecedented in our constitutional history.²

These methods have indirectly transformed the constitutional prohibition against racially discriminatory state action into an affirmative constitutional duty to integrate the Nation's schools. This has occurred because this Court has not clearly insisted that fact-finding in these cases, both with respect to the presence of purpose to segregate and the absence of alternatives to system-wide integration, be fairly and thoroughly undertaken. The lower federal courts have strained the meaning of this Court's opinions regarding each of these factual determinations and in so doing have loaded the "game board" against defendants by the use of explicit presumptions regarding intent and implicit presumptions regarding the extent and persistence of racial separation in fact caused by school district policies.

The time has come for this Court to restore fairness to school desegregation litigation and to restore the federal courts to their proper role in our system of government. This case presents the opportunity for this because it is a singular example of the circumvention of the intent requirement at the violation stage and the presumptive imposition of an extensive remedy bearing no relationship to the actual wrong in the remedy stage.

I.

The Legal Standard Regarding Purpose to Segregate

A. The standard employed by the Court of Appeals is in clear conflict with Keyes v. School District No. 1, 413 U. S. 189 (1973), and Washington v. Davis, 96 S. Ct. 2040 (1976).

1. L. Graglia, *Disaster By Decree: The Supreme Court Decisions on Race and the Schools* (1976); N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (1975).

2. Archibald Cox, *The Role of the Supreme Court in American Government* 77-90 (1976).

The first question presented by this case is whether this Court will insist that the lower courts apply its requirement that purpose or intent to segregate is an essential element of an Equal Protection Clause violation.

In *Keyes* this Court held that "purpose or intent to segregate" was the critical factor distinguishing unlawful segregation in this Nation's public schools from racial imbalance in the schools not prohibited by the Fourteenth Amendment. In *Keyes* this Court maintained the burden of proof on this issue on the plaintiff until the plaintiff demonstrated such a purpose behind actions of school authorities producing racial separation in a meaningful portion of the school district. Then, and only then, did this Court shift the burden of proof to the defendants to show that any racial separation in other portions of the school district was not the result of their intentionally segregative actions.

In contrast, the Court of Appeals adopted the following standard:

"... a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable, and foreseeable consequence of which is to bring about or maintain segregation. When that presumption arises, the burden shifts to the defendants to establish that 'segregative intent was not among the factors that motivated their actions.' " (App. pp. 107-108).

In so holding the Court of Appeals explicitly relieved the plaintiff in a school desegregation case of any burden of proof for any portion of the school district with respect to purpose or intent to segregate. It placed the entire burden of proof on this issue as to all racial separation

in the school district on the school authorities by requiring them to show that not one of their motives was to cause racial separation. Therefore, the Court of Appeals implicitly eliminated purpose or intent to segregate as an essential element of an Equal Protection Clause violation by placing an impossible burden of explanation on school authorities. This unjustifiable shift in the burden of proof is a prime example of the lower federal courts' use of unfair procedural rules which mandate substantive results.

It is patent that this presumption is fundamentally unfair.

First, by its very terms the standard places on the defendant the burden of proving a negative proposition. That is, the defendant must show that not one of its intentions was to cause or maintain segregation. Proof of a negative proposition—especially one regarding intentions—is notoriously and obviously difficult.

Second, in strict logic such a standard sets up an irrebuttable presumption. The standard is based on the assumption, as the Eighth Circuit explicitly noted, that the nature of the "state action" takes its quality from its foreseeable effect (App. p. 108). The purpose of an action is defined in terms of its foreseeable effect. The presumption applies only in those circumstances where one of the foreseeable effects of defendant's actions was to cause racial separation. Once such a foreseeable effect is shown, the standard ostensibly permits the defendant to rebut the inference of segregative intent by demonstrating that not one of its motives for action was such an intent. Since the standard defines intent from the effect of one's actions and since the plaintiff has already proven that one of the effects of defendant's actions was to cause racial separa-

tion, by definition the court must find that one of the defendant's motives was segregatory. Thus, the defendant will not be able to rebut the presumption since it cannot show that intent to cause racial separation was not at least one of its motives for action. Therefore, logically, the presumption employed by the Eighth Circuit is irrebuttable.

Third, even if the strict logic of the standard is not followed in practice, it does place on the defendant, as one court of appeals, *Morgan v. Kerrigan*, 509 F. 2d 580, 594, n. 21 (1st Cir. 1974), has recognized, at least the burden of showing that with respect to the questioned actions it acted with integrative intent. Thereby it places an obligation on school authorities to integrate their school systems, which duty this Court does not require unless purposeful segregation is already independently demonstrated.

Such a shift in the burden of proof is especially harsh for school districts utilizing a neighborhood school assignment policy in cities where there is residential racial imbalance, as is the case in Omaha. The presumption is readily invoked since it is apparent that the school district intentionally adopted a neighborhood school assignment policy and maintains it with conscious knowledge that such a policy produces racially imbalanced schools. Thus, all the plaintiff need show is that the school district employs a neighborhood school assignment policy and has residentially racially imbalanced neighborhoods. This showing alone makes out a *prima facie* case, which, given the difficulty of overcoming the presumption, amounts to a demonstration that the neighborhood school policy itself violates the Fourteenth Amendment. This implication of

the standard is no fanciful dream. The Fifth Circuit in *United States v. Texas Education Agency*, 532 F. 2d 380 (5th Cir. 1976), *petition for cert. filed*, 45 U. S. L. W. 3145 (U. S. August 24, 1976) (No. 76-200), held precisely this. Moreover, the Eighth Circuit in this case utilized an identical analysis in finding that the School District's policy with respect to school construction violated the Fourteenth Amendment. Racial imbalance effects mandated a finding of purposeful segregation.

Finally, the Court of Appeals' standard for proof of purpose to segregate logically implies a new substantive standard for violations of the Fourteenth Amendment. The Court of Appeals ostensibly developed its standard as a procedural rule for determining the presence of an essential element of a violation of the Fourteenth Amendment: purpose or intent to segregate. Its standard finds such purpose in actions or inactions whose foreseeable effects are racial separation or imbalance. It is clear, as a matter of fact, that school districts have the power to assign students so that racial imbalance would not exist. Thus, any racial imbalance present in a school system is the foreseeable consequence of inaction by school authorities. For this reason, the Court of Appeals' standard mandates a finding of purpose to segregate from the mere presence of any racial imbalance in a school system unless school authorities demonstrate at least that they acted with integrative intent with respect to this racial imbalance. Therefore, school authorities must either show that there is no racial imbalance in the schools or that they are attempting to eliminate what racial imbalance remains. In either case, the Court of Appeals' standard imposes an obligation on the school

authorities to completely integrate their school system if they wish to avoid a finding that they are purposefully segregating.

Thus, a procedural rule for determining an essential element of a constitutional violation effectively requires a new constitutional rule contradictory to the constitutional rule it purports to interpret. A rule presented as only procedural has changed the substantive law without any discussion by the Court of Appeals on the merits of such a change and while the Court of Appeals was giving the appearance that the substantive law had in fact remained unchanged. If racially imbalanced schools violate the Constitution *per se*, this Court should so state, but if they do not, then this Court should not permit the lower courts by indirection to find that they do.

Any doubt concerning the clear error of the Court of Appeals' standard was eliminated in *Washington v. Davis*, 96 S. Ct. 2040 (1976). Therein this Court, once again stressing the necessity of proof of discriminatory racial purpose in making out an equal protection violation, specifically disapproved lower court interpretations of *Palmer v. Thompson*, 403 U. S. 217 (1971), and *Wright v. Council of the City of Emporia*, 407 U. S. 451 (1972), which held that the operative effect of official action rather than its purpose was the paramount factor for the Fourteenth Amendment. Not only did the Court of Appeals explicitly rely on the disapproved interpretation of each of these cases in devising its standard (App. pp. 108-109), but also this Court in *Washington v. Davis* specifically disapproved a standard almost identical to that of the Court of Appeals. This Court cited *Wade v. Mississippi Cooperative*

Extension Service, 372 F. Supp. 126, 143 (N. D. Miss. 1974), as an example of lower court error in eliminating the necessity of proof of discriminatory purpose. 96 S. Ct. at 2050 n. 12. On the very page cited by this Court, that district court used a standard almost identical to the Court of Appeals here.

Therefore, this case presents an opportunity for this Court to resolve a recurring substantial problem in school desegregation litigation: is proof of purpose to segregate necessary, and if so, what is the appropriate standard for determining it? The Court of Appeals is clearly in error. This error has had a substantial detrimental effect on the lives, liberty, and property of the citizens and school children of the School District of Omaha. This fact alone demands action by this Court.

More significantly, however, this error is not the Eighth Circuit's alone, as the following section of this Petition demonstrates. The Eighth Circuit and the other circuits which have taken a similar position have constructed a body of law which has determined in advance the outcome of school desegregation litigation for urban school districts with ethnically or racially imbalanced neighborhoods. It is time for this Court to restore fairness to school desegregation litigation by insisting that the lower courts, as did the District Court here, follow this Court's standards for determining purpose or intent to segregate. Therefore, this Court should grant the Petition for a Writ of Certiorari, reverse the Eighth Circuit, and remand this case to it with an order to affirm the District Court.

B. There is a Conflict in the Courts of Appeals on the Proper Standard for Ascertaining Segregative Intent.

Since *Keyes*, one of the main concerns of "northern and western" school desegregation litigation has been the question of what sort of proof, if any, is necessary to establish an intention or purpose to segregate and how the burden of proof on this issue is to be allocated. Seven Circuit Courts of Appeals have considered these questions and have come to varying conclusions.

The Ninth Circuit,³ the Seventh Circuit,⁴ and one panel of the Sixth Circuit⁵ have employed a standard similar to that adopted by this Court in *Washington v. Davis* and by the District Court in this case. These courts require the plaintiff, unaided by any presumption in the first instance, to prove racially discriminatory motivation for school authorities' actions causing racial separation in a meaningful portion of the school district before a court may find a constitutional violation. The Sixth Circuit in *Higgins* explicitly recognized that segregative intent may be inferred from the foreseeable consequences of a school district's actions,⁶ but held mere proof that school district

actions had a foreseeably segregative effect was not sufficient to compel a finding of segregative intent.⁷ The Ninth Circuit emphasized the role of the trial court in determining segregative intent because the credibility of school officials' testimony is crucial on this question.⁸ The Ninth Circuit, like the District Court here, held that segregative effects are not determinative on the question of intent. The Seventh Circuit explicitly recognized this Court's rule in *Washington v. Davis* and that purpose may, but need not, be inferred from the totality of relevant facts, which may include discriminatory impact.⁹

The First Circuit, although less clearly than the Ninth Circuit, also appears to have approved a standard similar to that applied by the District Court in this case because it recognized that the *Keyes* burden-shifting presumption did not apply until the district court had made independent findings of intentional segregation in a significant portion of the school district.¹⁰ That Circuit further found that the district court correctly inferred segregative intent because it relied upon the permissible inference of intent from consciously consummated acts and because that inferred intent was consistent with the expressed motivation.¹¹

On the other hand, the Second Circuit has done explicitly what the Eighth Circuit has done here implicitly,

3. *Berkelman v. San Francisco Unified School District*, 501 F. 2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District*, 500 F. 2d 349 (9th Cir. 1974); and *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d 579 (9th Cir. 1973).

4. *Armstrong v. Brennan*, 539 F. 2d 625 (7th Cir. 1976).

5. *Higgins v. Board of Education of City of Grand Rapids*, 508 F. 2d 779 (6th Cir. 1974).

6. *Id.*, at 793.

7. *Id.*, at 787-88, 793.

8. *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d at 588.

9. *Armstrong v. Brennan*, 539 F. 2d at 634.

10. *Morgan v. Kerrigan*, 509 F. 2d 580, 594 (1st Cir. 1974).

11. *Id.*, at 592.

by holding that proof of lack of segregative intent is irrelevant once it is established that school district actions and omissions have the natural and foreseeable consequence of causing educational segregation.¹²

The Fifth Circuit, in its most recent consideration of this issue, has taken a position similar to the Second Circuit.¹³ Therein it held that proof of purpose or intent to segregate is conclusively established by the utilization of a neighborhood school assignment policy in racially or ethnically imbalanced neighborhoods.¹⁴

Another panel of the Sixth Circuit¹⁵ has taken a position similar to that adopted by the Eighth Circuit here. The standards are identical in requiring a shift in the burden of proof to the school district upon a showing of racially segregative effects. This panel of the Sixth Circuit does not, however, explicitly place upon the school district the burden of proving a negative proposition. Rather, it requires that the defendants "affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies".¹⁶ In its most recent decision discussing the issue,¹⁷ the Sixth Circuit has taken the position that proof of purpose or intent

to segregate from actions having racial imbalance effects is simply a permissive inference. In this opinion, however, it did not indicate what sort of burden of proof is placed on the defendant with respect to this question.

This conflict in the Courts of Appeals has continued to produce contrary results since the last time Petitioners raised this issue to this Court. The District Court for the Northern District of California in *Diaz v. The San Jose Unified School District*, 412 F. Supp. 310 (N. D. Calif. 1976), specifically recognized the conflict in the circuits referred to above, recognized that the Ninth Circuit places the burden on the plaintiff to show purpose or intent to segregate, and, based on this interpretation, found for the defendants.¹⁸

The differing approaches taken by the Courts of Appeals and the disarray of the law on this most vital question speak for this Court's guidance now to clarify the proper role of proof of segregative intent in school desegregation cases and the proper allocation of the burden of proof as to intent. The differences in standard are not of academic interest only. They have brought about opposite results in the face of similar facts as is shown by the Eighth Circuit's decision in this case and the Sixth Circuit's decision in *Higgins*; and they have brought about opposite results on identical facts as is shown by the decisions of the District Court and the Eighth Circuit in this case. The time has come for this Court to settle this vital question of law and instruct the Courts of Appeals to follow the law as set down by it in *Keyes* and *Washington v. Davis*.

12. **Hart v. The Community School Board of Education, New York School District No. 21**, 512 F. 2d 37, 51 (2nd Cir. 1975).

13. **United States v. Texas Education Agency**, 532 F. 2d 380 (5th Cir. 1976).

14. **Id.**, at 392.

15. **Oliver v. Michigan State Board of Education**, 508 F. 2d 178 (6th Cir. 1974).

16. **Id.**, at 182.

17. **Bronson v. Board of Education**, 525 F. 2d 344 (6th Cir. 1975).

18. 412 F. Supp. at 329.

II.**The Legal Standard Regarding the Scope of the Remedy**

A. The Court of Appeals' unwarranted requirement of system-wide integration conflicts with this Court's remedy decisions since it failed to make the findings of fact necessary for the imposition of such a remedy.

The second question presented by this case is whether school authorities have an affirmative duty to integrate the entire school system when there has been no showing or finding that actions by school authorities caused system-wide racial separation and no showing or finding that the racial separation in fact caused by actions of school authorities will continue after the simple prohibition of those actions.

This question is also of great national significance. The kind of remedy imposed by the Court of Appeals' guidelines in this case is not unique to Omaha. Most other lower federal courts have required such remedies after finding a violation of the Fourteenth Amendment by school authorities. Such remedies have caused drastic alterations in normal neighborhood student assignment procedures, the expenditure of millions of dollars for buses and gasoline instead of education, no measurable increase in educational achievement for black children, and ultimately, in many cities, more severe racial separation than before their institution.

Since these remedies touch the lives of so many citizens in an area of such vital concern—the well-being and education of their own children—they have focused public

scrutiny on the federal courts. Outraged public violence, thankfully, was never present in Omaha and has subsided nationally, but deep public concern continues on the role of the federal courts and the fairness of the rules employed by those courts in dealing with racial separation in America's schools. Such concern has prompted scholarly criticism particularly on the proportionality between these remedies and the wrong usually demonstrated.¹⁹ The School District here raises two remedial issues directly presented by this case which question the fairness of lower court rules for determining school desegregation remedies because such rules are primarily responsible for the disproportion between the remedy and the wrong.

Although this Court's remedy decisions contain arguably conflicting themes, certain fundamental principles do emerge which, if properly applied, can at least assure the Nation that such remedies are not needlessly imposed. The lower federal courts have, however, been inattentive to these principles. The time has come for this Court to speak directly and forcefully to guide the lower federal courts regarding appropriate remedies in school systems where racial separation was never mandated by law and regarding the factual inquiry which must be undertaken before such determinations can be made.

19. L. Graglia, *supra* note 1, at 160-202; N. Glazer, *supra* note 1, at 77-129; Goodman, *De Facto School Segregation*, 60 Calif. L. Rev. 275, 387-91 (1972).

1. The Court of Appeals' view of the School District's remedial obligation: an affirmative duty to integrate.

The Court of Appeals placed upon the School District the obligation to "bring about a thoroughly integrated school system. . . ." (App. p. 129). Throughout its treatment of the remedy required (App. pp. 129-33) the Court of Appeals viewed the School District's obligation as being one of integration: The School District must *integrate* its faculty and *integrate* its student body. It must utilize "integration techniques".

A similar obligation was placed on the District Court. It was required to retain jurisdiction to assure that the plan ultimately adopted was one "which effectively integrates the entire Omaha School System. . . ." (App. p. 133). The Court of Appeals, in approving the plan ordered by the District Court, continued to speak of the School District's constitutional obligation as a duty to integrate (App. pp. 172-75).

Never did the Court of Appeals carefully examine the exact extent of racial imbalance in fact caused by the policies it found violative of the Fourteenth Amendment. Nor did it determine that these effects would continue to exist after the elimination of these policies.

2. This Court's remedial requirement: a racially neutral student assignment system.

This Court in *Brown v. Board of Education*, 349 U. S. 294 (1955), determined that a school district which had intentionally assigned children on the basis of race had the remedial obligation to "achieve a system of determining admission to the public schools on a non-racial basis". 349 U. S. at 300-301. The contours of this obligation have

changed over twenty-one years of judicial decision-making. Arguably, this Court for a time indicated that the obligation was entirely different.²⁰ But in *Pasadena City Board of Education v. Spangler*, 96 S. Ct. 2697, 2704-05 (1976), this Court strongly reasserted that *Brown II* correctly stated a school district's remedial obligation.

There is no unconditional duty to integrate entire school systems. Nor is such a goal, whatever its merits, the appropriate mandate of the Equal Protection Clause. The Fourteenth Amendment prohibits official racial classifications, requires their elimination, and demands the institution of a system which utilizes racially neutral criteria for a student assignment system. All judicial remedies must be assessed in light of this standard.

On its face, the Court of Appeals' determination of the School District's remedial obligation clearly violated this Court's recently reasserted position since it places on the School District an affirmative duty to integrate rather than the duty to devise and institute a racially neutral method of student assignment.

The only possible justification for such an affirmative duty rests upon a misunderstanding of what this Court held in *Green v. School Board of New Kent County*, 391 U. S. 430 (1968), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). In each of these cases this Court rejected student assignment systems which did not explicitly classify students on the basis of race and were, therefore, on their face "racially neutral". The holdings in these cases, however, are not inconsistent with *Brown II* and *Pasadena*. These "racially neutral"

20. *Keyes v. School District No. 1*, 413 U. S. 189, 200 n. 11 (1973).

assignment plans were unacceptable only because they failed to counteract "the continuing effects of past school segregation" resulting from discriminatory actions by school authorities. 402 U. S. at 28. An affirmative duty to thoroughly integrate the public schools arises if and only if: first, actions of school authorities taken with a purpose to segregate in fact caused the racial separation which the remedy seeks to cure; and second, the institution of a racially neutral assignment plan would not eliminate the racial separation effects in fact caused by these purposefully discriminatory actions.

The Court of Appeals' requirement of complete integration is not justified since its racial balance guidelines were determined without any finding that the School District caused the racial separation which the Court of Appeals' remedy sought to cure.

The Court of Appeals' remedy guidelines required that all of the majority black schools be less than 50% black, but nowhere did the Court of Appeals find that each of the majority black schools would have been less than 50% black but for the actions it found violative of the Fourteenth Amendment. No such finding was made because the evidence was never examined by the Court of Appeals from this perspective. Its examination of the evidence on the question of liability focused on the finding of a causal relation between School District action and *some* racial imbalance effect. The exact extent was never carefully analyzed.

Moreover, the record simply would not support such a finding. To be sure, if the Court of Appeals correctly

found purposeful segregation, there is evidence in the record from which one could conclude that the questioned actions of school authorities had some racial separation effects. However, the Court of Appeals did not find that the School District's neighborhood school assignment policy was itself purposefully discriminatory. Rather, the entire dispute between the parties focused on certain variations in that policy and the motivation for those variations.

In analyzing those variations to determine if they caused racial separation, the Court of Appeals did make certain findings of causation. These findings, however, cannot be utilized as a substitute for a factual inquiry into the exact extent of the racial separation caused by these variations as distinguished from the racial separation caused by other factors.

First, the Court of Appeals clearly focused on the wrong facts in analyzing the open transfer policy (App. p. 116). At least from the perspective of assessing the extent of the racial separation effects of such a policy, the percentage of white students utilizing the policy is irrelevant. The critical factor is what effect the policy had on the racial identifiability of the schools. This, the Court of Appeals neglected. The record clearly revealed that these effects were negligible, an average of a three to four percent difference in the percentage of black enrollment in schools with a 35% or greater black enrollment. Second, the Court of Appeals made no determination of the racial separation effects on Horace Mann Junior High School of the failure to assign Sherman and Pershing Elementary Schools as feeder

schools for it (App. p. 120). Third, no analysis was made of the racial separation effects of the assignment of black faculty to already black schools (App. pp. 110-113). Fourth, no analysis was made of the percentage increase in white enrollment at South High School (App. p. 116) or any other high school due to transfers from Technical High School (App. pp. 124-29). The Court of Appeals merely focused on the raw number of such transfers (App. p. 116). Finally, even when the Court of Appeals, in examining optional attendance zones for certain elementary schools feeding Technical Junior High School, focused on the correct analysis for determining the extent of racial separation attributable to these variations, its findings indicated that Technical Junior High School still would have been an identifiably black school even if the school authorities had not adopted these variations in a strict neighborhood school policy (App. p. 119).

Nonetheless, the Court of Appeals ordered that no school was to be identifiably black judged by its enrollment. What caused the schools to become racially identifiable was not the variations in the neighborhood school policy, but the growth of racially imbalanced neighborhoods superimposed on a pre-existing neighborhood school policy.

An affirmative duty to thoroughly integrate cannot arise unless the extent of the racial separation caused by these variations is determined and a finding made that they caused substantially all of the racial imbalance present in the schools because this Court clearly requires that the scope of the remedy be determined not by the extent of racial separation present in the schools but by the na-

ture and extent of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. at 16; *Milliken v. Bradley*, 418 U. S. 717, 744 (1974). This Court explained this principle in *Milliken* by stating that school desegregation remedies must necessarily be designed solely to restore the subjects of discriminatory conduct by school authorities to the position they would have occupied in the absence of such conduct. 418 U. S. at 746.

It was simply unfounded and unreasonable speculation for the Court of Appeals to assume that the schools in Omaha would all have been thoroughly integrated but for the slight variations in the neighborhood school assignment policy which it found violative of the Fourteenth Amendment. This Court's decisions demand a proportionality between the remedy and the wrong and the Court of Appeals' remedy for Omaha does not have it.

The Court of Appeals' requirement of complete integration is also unjustified under *Green* and *Swann* because it imposed this requirement without any inquiry into, or finding that, the racial separation effects of the policies it found violative of the Fourteenth Amendment could not be eliminated by the institution of a racially neutral assignment plan, such as a strict neighborhood school policy.

Had the Court of Appeals examined the record in this light it could only have found that the negligible racial identifiability caused by the variations from a strict neighborhood school policy would have been eliminated without

requiring complete integration of the entire Omaha school system. The assignment of black faculty to already black schools clearly did not add to those schools any racial identifiability not already present by virtue of their enrollment, and certainly none that could not be cured by a racial balance faculty assignment policy. There were no lingering effects with respect to Technical Junior High School since it had long since been closed for racially neutral reasons and its student body reassigned on a neighborhood school basis. The assignment of Sherman and Pershing Elementary Schools as feeder schools to Horace Mann Junior High would have been accomplished by requiring a strict neighborhood school assignment policy. Technical High School's racial identifiability could have been, and has been, eliminated by curriculum reform and active recruitment of students within its city-wide attendance zone.

Therefore, since the Court of Appeals did not and could not make the findings of fact necessary to authorize complete integration under *Green* and *Swann*, the imposition by judicial decree of such a remedy on the School District is without foundation in this Court's decisions.

It is precisely such far-reaching remedies based on mere speculation, rather than careful fact finding, which have jeopardized public trust in the courts. This Court can restore confidence in the judicial process by requiring that the lower federal courts base orders to integrate not on speculation or the desire to obtain a particular social

order but on careful factual analysis and this Court's interpretation of the Fourteenth Amendment. But such restoration can occur only if this Court speaks soon and definitively. This case presents the opportunity since the Court of Appeals required complete integration of the public schools without even attempting the kind of inquiry which this Court's remedy decisions properly mandate before such a remedy can be required.

The significance of the remedial issue presented by this case cannot be overstated. While this Court cannot assure that all judges at all times in all cases will act with consideration for the virtues of judicial restraint, it can, and should, insist at this time and in this case that the lower courts give rigorous attention to the limits of, and prerequisites for, the exercise of their authority. For nothing less is involved here than this:

"While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves." *Furman v. Georgia*, 408 U. S. 238, 470 (1972) (Rehnquist, J., dissenting).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Eighth Circuit.

Respectfully submitted,

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APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution,
Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. § 2000e-6:

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .

. . .
and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board . . . and after certifying that he is satisfied that such board . . . has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the

United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

42 U. S. C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.